

**THE QUEEN'S BENCH
WINNIPEG CENTRE**

IN THE MATTER OF: THE APPOINTMENT OF A RECEIVER PURSUANT TO SECTION 243 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985 c. B-3, AS AMENDED AND SECTION 55 OF *THE COURT OF QUEEN'S BENCH ACT*, C.C.S.M. c. C280

BETWEEN:

WHITE OAK COMMERCIAL FINANCE, LLC,

Applicant,

- and -

NYGÅRD HOLDINGS (USA) LIMITED, NYGARD INC., FASHION VENTURES, INC., NYGARD NY RETAIL, LLC, NYGARD ENTERPRISES LTD., NYGARD PROPERTIES LTD., 4093879 CANADA LTD., 4093887 CANADA LTD., and NYGARD INTERNATIONAL PARTNERSHIP,

Respondents.

**SUPPLEMENTARY BRIEF OF THE
RECEIVER (RECORDS ACCESS)**

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II. LIST OF FURTHER AUTHORITIES

Tab

1. *General Electric Canada Real Estate Financing Holding Co. v Liberty Assisted Living Inc.*, 2011 ONSC 5741.

III. POINTS TO BE ARGUED

1. The Receiver files this Supplementary Brief in order to provide this Honourable Court with a further authority dealing with a receiver's right to access and review records as part of its mandate under the Order pronounced in this proceeding on March 18, 2020 (the "**Receivership Order**").

Possession and Review of Records

2. The provisions at paragraphs 8 and 9 of the Receivership Order dealing with a receiver's right to access and review records are based upon the standard form of receivership order in Manitoba, which is in turn based on the Ontario model receivership order. In the case of *General Electric Real Estate Financing Holding Co. v. Liberty Assisted Living Inc.*, 2011 ONSC 574 ["*GE Real Estate*"], Brown J. considered those provisions in the context of a dispute between the court-appointed receiver and the debtor (and its principals) relating to access to records.

3. In the *GE Real Estate* case, the debtor company and its principals were unwilling to provide the receiver with full and unfettered access to a server and certain physical records the receiver was seeking to review and inspect. The basis for the refusal of access to the server was that in addition to records owned by the debtor company, the server also contained records of other companies that were not the subject of the receivership order, personal records of the principals of the debtor company, and other records which included privileged correspondence with counsel. In terms of the physical

records, it was stated that they were co-mingled with records of other companies not subject to the receivership order.

GE Real Estate, supra., at paras 7, 27 [Tab 1]

4. Brown J. determined that the debtor company was obligated under the standard terms of the order appointing the receiver to grant the receiver “immediate, unfettered access to the computers and server on which the Records are located.” Brown J. also noted that the debtor company’s failure to do so risked attracting significant judicial sanctions.

GE Real Estate, supra., at paras 23 [Tab 1]

5. In coming to his determination on the matter, Brown J. made the following statement:

As can be seen, the defined term “Records” is not limited to documents owned by 285. Instead, it encompasses documents “related to the business or affairs of 729285”. As the Reports of the Receiver disclose, 285 and its principals have stated that some information relating to the business or affairs of 285 will be found on records owned by related companies. That state of affairs has resulted from a decision of the Liberty Group of companies to operate its affairs and maintain its records in an inter-connected and co-mingled fashion. Consequently, for the Receiver to exercise the powers granted to it under the Appointment Order, it is inevitable that the Receiver will have to inspect and consider documents owned by companies related to 285. If the Respondents have intermingled the records of their companies so that documents relating to the business or affairs of 285 are owned by, or are under the control of, other Liberty Group companies, that does not permit the Respondents to deny access to those documents or to a computer server on which they are stored. Paragraphs 8 and

9 of my Appointment Order are not limited to documents *owned* by 285; they encompass documents “*relating to the business or affairs of 729285*”. With all due respect, nothing could be clearer.

GE Real Estate, supra at para 19 [Tab 1]

6. In connection with access to the physical records, Brown J. also stated:

As in the case of the electronic Records, I question why I need to grant further relief beyond that which is set forth in paragraphs 8 and 10 of the Appointment Order. I repeat: 285 must comply with that order. That means the Receiver can enter into and have unfettered access to the Records relating to 285. That means the Receiver can inspect the filing cabinets or other Record depositories at those locations. If those Record depositories contain documents owned by a non-285 company, then the Receiver cannot exercise its powers under paragraph 8 of the Appointment Order unless (and that is a big unless), the document “relates to the business or affairs of 729285”. Again: if the Respondents have intermingled the records of their companies so that documents relating to the business or affairs of 285 are owned by, or are under the control of, other Liberty Group companies, that does not permit the Respondents to deny access to those documents to the Receiver. Paragraph 8 of my Appointment Order is not limited to documents *owned* by 285; it encompasses documents “*relating to the business or affairs of 729285*”.

GE Real Estate, supra at para 31 [Tab 1]

7. In the present case, the Receiver has taken possession and/or control of physical and electronic records (or same are subject to the possession and/or control of the Receiver) located at various premises that were occupied and controlled, and used, by the Respondents as at the date of the Receivership Order, or contained within the Respondents’ computers, servers, systems and networks, including “Records” as that term is defined in the Receivership Order.

8. This state of affairs has resulted from a decision by the “Nygard organization” to operate its affairs and maintain its records in an inter-connected and co-mingled fashion.

9. As in the *GE Real Estate* case, it is alleged here that intermingled with the “Records” as defined in the Receivership Order are records owned by Non-Debtor entities, personal records of former employees, officers or directors of the respondents, and communications that may be subject to a claim of solicitor-client privilege.

10. Based upon the *GE Real Estate* case, and as an inevitable consequence of the manner in which the Respondents maintained records prior to the Receivership Order, it is respectfully submitted that the Receiver in this case must have full and unfettered access to review the physical and electronic records that were in the possession of the Respondents as at the date of the Receivership Order. Nevertheless, the Receiver recognizes that other parties may have rights in respect of certain documents or records that are currently in the Receiver’s possession and/or control, and that the Receiver, as an officer of this Honourable Court, has a duty to deal with those rights in a fair and reasonable manner.

11. The Receiver respectfully submits that, in the context of the complexity of the physical and electronic records system of the “Nygard organization”, the proposed Documents and Electronic Files Access Order is consistent with the findings and directions made by Brown J. in the *GE Real Estate* decision, while at the same time balancing the rights and interests of other parties who have rights or interests in

connection with the documentation that is now in the possession and/or control of the Receiver.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of April, 2020.

THOMPSON DORFMAN SWEATMAN LLP

Per: 

G. Bruce Taylor / Ross A. McFadyen
Lawyers for Richter Advisory Group Inc.,
the Court-Appointed Receiver

2011 ONSC 5741

Ontario Superior Court of Justice [Commercial List]

General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living Inc.

2011 CarswellOnt 11083, 2011 ONSC 5741, 208 A.C.W.S. (3d) 20, 83 C.B.R. (5th) 139

General Electric Canada Real Estate Financing Holding Company and General Electric Capital Canada Holdings Company (Applicants) and Liberty Assisted Living Inc., 729285 Ontario Limited, Amir Kassam, Rahim Bhaloo and Meyers Norris Penny Limited in its capacity as Receiver and Trustee in Bankruptcy of the Estates of 2008777 Ontario Inc., 2004631 Ontario Inc., 912087 Ontario Limited and 2007383 Ontario Inc. (Respondents)

D.M. Brown J.

Heard: September 27, 2011
Judgment: September 28, 2011
Docket: CV-11-9169-00CL

Counsel: C. Prophet for Receiver

L. Brzezinski for Applicants

T. Pinos for Respondents, Liberty Assisted Living Inc., 729285 Ontario Limited, Amir Kassam, Rahim Bhaloo

S. Mitra, D. Reiter for Proposed Receiver, Albert Gelman Inc.

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications

Debtors and creditors

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Debtors and creditors

[VII Receivers](#)

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[VII.6.b Rights](#)

Headnote

Debtors and creditors --- Receivers — Conduct and liability of receiver — General conduct of receiver

Under appointment order, receiver was appointed with full powers of investigation and monitoring in relation to respondent 729 Ltd. — Receiver brought motion for, inter alia, specific relief relating to access to records — Motion granted, with few modifications — As regards electronically stored records, 729 Ltd. and its principals breached appointment order in denying receiver access to computers records were stored on and in not permitting receiver to make bitmap image of information in issue — 729 Ltd. and its principals also breached certain later order as they did not deliver bitmap image to their counsel by stipulated deadline — By its obstruction of receiver's efforts to gain access to computers records were stored on, 729 Ltd. emasculated receiver and its investigative utility by turning it into mere repository of such information as 729 Ltd. saw fit to release — Such conduct was breach of appointment order — If respondents had intermingled records of their companies so documents relating to business or affairs of 729 Ltd. were owned by or under control of other companies in group, that did

not permit them to deny access to those documents or server they were stored on — Relevant paragraphs of appointment order were not limited to documents owned by 729 Ltd., but encompassed documents relating to business or affairs of 729 Ltd. — Relief sought granted with few modifications, and certain additional relief granted — As regards hard copy records, 729 Ltd. breached appointment order in denying receiver access to locations records were located and assuming control over process of selecting records it then fed to receiver — It was questioned, as in case of electronic records, why relief needed to be granted beyond that set forth in appointment order, but relief sought granted.

Debtors and creditors --- Receivers — Conduct and liability of receiver — Rights

Receiver was appointed under appointment order as receiver with full powers of investigation and monitoring in relation to respondent 729 Ltd. — Receiver brought motion seeking, inter alia, expansion of its examination powers so that it could examine under oath all individuals that allegedly advanced monies to 729 Ltd., all individuals and corporations which had had loans due to or from 729 Ltd., and all individuals and/or corporations that received funds from sale of certain property — Motion granted, with few modifications relating to certain other relief sought — 729 Ltd.'s submission that it would be premature to make such order, and that issue should be parked until completion of production process and examination of certain principal of 729 Ltd., was not accepted — Based on chronology of events set out in receiver's reports, failure of 729 Ltd. to comply with production requirements of appointment order rendered it just, reasonable and necessary to grant receiver requested powers of examination — Evidence disclosed that 729 Ltd. was doing its best to stonewall receiver and delay production of relevant documents and information — Under those circumstances, expansion of receiver's powers of examination was necessary in order to enable receiver to complete its investigation within stipulated time.

Table of Authorities

Cases considered by *D.M. Brown J.*:

General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living Inc. (2011), 2011 ONSC 4136, 2011 CarswellOnt 5867, 80 C.B.R. (5th) 259 (Ont. S.C.J. [Commercial List]) — referred to

General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living Inc. (2011), 2011 CarswellOnt 8054, 2011 ONSC 4704, 81 C.B.R. (5th) 265 (Ont. Div. Ct.) — referred to

MOTION by receiver for specific relief regarding access to records, and for expansion of its examination powers.

D.M. Brown J.:

I. Motion to expand powers of an investigative receiver

1 In Reasons released June 30, 2011,¹ I appointed Albert Gelman Inc. ("AGI") as receiver with full powers of investigation and monitoring in relation to the respondent, 729285 Ontario Limited ("285"). On August 29 the Receiver appeared before Spence J. seeking certain orders, including the expansion of its powers. On consent Spence J. granted certain relief, and adjourned the balance of the motion, which I heard yesterday.

2 The Receiver seeks specific relief requiring 285 to provide access to certain Record storage sites and to deliver up Records of its business, including electronic Records. The Receiver also seeks an expansion of its examination powers so that it can examine under oath (i) all individuals that allegedly advanced monies to 285, (ii) all individuals and corporations which have had loans due to or from 285, and (iii) all individuals and/or corporations that received funds from the sale of the Royalton Residences, as defined in my order of June 30, 2011 (the "Appointment Order").

3 In support of its motion the Receiver filed its First Report dated July 11, 2011, its Second Report dated August 17, 2011, its Supplementary Second Report dated August 27, 2011 and its Second Supplementary Report to its Second Report dated September 22, 2011. Paragraph 7 of the order of Spence J. directed the Respondents to file any responding materials by September 6. They have not filed any such materials.

4 Let me start by dealing with the issues surrounding the electronic Records, since the conduct by 285 in respect of the electronic Records reflects, in large part, the approach which it has taken towards complying with those portions of my Appointment Order concerning the hard copies of Records.

II. Access to electronic records issue

A. The relief sought by the Receiver

5 In its proposed draft order the Receiver seeks two forms of relief: (i) an order that 285 prepare and deliver by October 12 an affidavit listing all electronic Records on servers which 285 does not object to producing on the basis of privilege, together with a list of those that it does, and the reasons for the objection; and, (ii) an order that the company deliver to the Receiver by October 12 electronic and paper copies of all electronic Records which it does not object to producing on the grounds of privilege.

B. Chronology of events

6 I question the need to add to that which I thought was evident from my Appointment Order, paragraph 9 of which provided:

THIS COURT ORDERS that if any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, all Persons in possession or control of such Records shall forthwith give unfettered access to the Receiver for the purpose of allowing the Receiver to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or a bitmap image or such other manner of retrieving and copying the information as the Receiver in its discretion deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Receiver. Further, for the purposes of this paragraph, all Persons shall provide the Receiver with all such assistance in gaining immediate access to the information in the Records as the Receiver may in its discretion require including providing the Receiver with instructions on the use of any computer or other system and providing the Receiver with any and all access codes, account names and account numbers that may be required to gain access to the information.

(emphasis added)

7 I made that order on June 30, nearly three months ago. According to the Reports of the Receiver, 285 still has not provided it with “unfettered access” to its computer system. Indeed, 285 has provided the Receiver with NO access to its computer system. Instead, according to the Reports of the Receiver, the following has transpired:

- (i) Efforts by the Receiver to attend 285’s premises on July 8 were unsuccessful because the premises were locked;
- (ii) The Receiver attended 285’s premises on July 11. Entry was denied by Mr. Kassam, stating that the Receiver should meet with Mr. Goutis. In a telephone conversation with Mr. Goutis later that day he told the Receiver any meeting should be delayed until after the hearing of a motion to stay the Appointment Order;
- (iii) The Receiver was not given access to 285’s computer Records during attendances on July 13 and 14;
- (iv) In a memo to 285 dated July 13 the Receiver confirmed its request for physical access to 285’s server data so that it could “extract and obtain copies of any data pertaining to 285”;
- (v) Receiver’s counsel wrote to 285’s counsel on July 13 advising, *inter alia*:

Our client understands that [285] wishes to convert to a new accounting system. Our client is concerned that accounting or other electronic records may be destroyed or deleted in the process of a conversion. This would

contravene paragraph 9 of the Appointment Order. Until our client has obtained a bit map image of the server, there should be no conversion of the accounting system. My client will be attending at the registered head office of [285] at 1:30 p.m. tomorrow to start the process of obtaining a bit map image of the server in accordance with paragraph 9 of the Appointment Order.

(vi) That elicited a response by 285's counsel on July 14 that his client was denying access to 285's server for the following reason:

The server at 231 Avenue Road contains the records of a number of companies other than 729285, personal records and email and other records which include privileged correspondence with counsel. Given this fact, access will not be provided to the receiver to make a bit map image of the server. Rather, as you note, Mr. Goutis is arranging to generate hard and soft copies of the accounting data on the server relating to 279285 which will be provided to that Receiver. Given that there is no risk to the accounting data from the move to new accounting software, we trust this is satisfactory.

(vii) In an email sent July 14 Receiver's counsel offered very practical suggestions to the problems 285 was raising regarding the Receiver's access to its server pursuant to the Appointment Order:

On a preliminary basis:

a/ I think my client's IT consultant will have to understand the process of the conversion to confirm the assertion that there is no danger to the integrity of the accounting data. Can you advise who he may speak to in this regard.

b/ Is there any reason that the privileged documents cannot be removed from the server and deleted to provide a bit map image? Again this seems to be an issue for the IT consultants of our respective clients.

c/ If there are records of other companies with respect to their dealings with 729285 Ontario Inc. my client is entitled to same. My client will not need to review records of (sic)

d/ Is there an issue in taking a bit map image for now and leaving it with you in escrow to preserve records for now and dealing with it only if the issue arises?

(viii) 285's counsel responded on July 15 proposing further discussions on the electronic documents issues;

(ix) The Receiver's counsel wrote back on July 15:

We believe that a bit map image should be taken and remain in escrow in the event there is any dispute over electronic disclosure. The IT consultant of our client cannot opine on the assertions in your email of July 15, 2011 unless it has a chance to review the system. Accordingly, a conversation at this stage with the two of us would place us at a disadvantage.

Notwithstanding the issue of a bit map copy, our client requires access to the company's server in order to identify electronic records that are subject to disclosure. My client has recommended that its IT consultant meet with your client's IT consultant or Mr. Goutis in order to understand the file structure and systems of the server. They can then jointly recommend an appropriate method to identify, copy and/or print those electronic records required to be produced. Such records may include, but not necessarily be limited to, accounting system files, correspondence files, electronic memos, email messages and electronic copies of legal documents not otherwise disclosed to date. In the event that Mr. Goutis is unfamiliar with the accounting systems to allow printing, exporting or copying [285] will have to provide a person experienced to assist the Receiver in this regard.

Again the issue of the scope of the review is an issue, it remains the Receiver's position that all records of

other companies and their dealings with [285] should be produced. Our client should not have to guess whether complete disclosure has been made by your client. In the event there is any disagreement on the entitlement to records, a motion for direction may be brought to resolve the same.

(x) 285's counsel responded, some 10 days later on July 25, stating:

With respect to electronic records, my client's position is set out in my previous emails. The server which contains the accounting records of 729285 contains the records of other Liberty related businesses, including all e-mails, which include solicitor-client privilege documents. Mr. Goutis has indicated that he would provide an electronic back-up of all of the electronic files relating to 729285, and this should be sufficient for the purposes of the receiver. Again the receivership order does not entitle the receiver to have access to business records other than those of 729285.

(xi) On August 4 Lederman J. heard 285's motion for leave to appeal from the Appointment Order. On August 10 Lederman J. dismissed the motion;²

(xii) On August 4 the Receiver met with Messrs. Bhaloo and Goutis, representatives of 285. It sent 285 a memorandum dated August 5 memorializing the points discussed in that meeting. The Receiver advised 285 it would move before the Court on August 29 for further ancillary powers. The memorandum recorded the following discussion:

Mr. Bhaloo requested the reason for which the Receiver would be continuing with its motion and whether or not it would reconsider the need for the motion. The Receiver indicated that it would be discussing same with its counsel. However, it would be taking into consideration the following: documentation received to date; inaccessibility to physically catalogue and review records at 285's premise and storage location; inability to obtain a bit map image of server contents; and inability to obtain a catalogue of and access to 285's electronic records.

Mr. Bhaloo advised that the Receiver should make request for documentation and that the representatives of 285 would determine which documents were relevant to the Receiver's mandate to determine if disclosure should be made. The Receiver indicated that it disagreed with this manner of disclosure.

(xiii) In its Second Report dated August 17, 2011 the Receiver stated:

[16] The Receiver is unaware what changes have been made to the electronic Records since its appointment. Regardless, the Receiver believes that it would be prudent for it to obtain a bit map image of the server in order to preserve the integrity of all data on the server pending any further Order of the Court regarding access to the server.

(xiv) On August 23 counsel for 285 delivered to the Receiver hard copies of some of the documents it had requested. 285 still denied the Receiver access to its server;

(xv) The parties appeared before Spence J. on August 29. (I was on vacation.) On consent, Spence J. extended the term of the Receivership from 120 days to 210 days. I understand why that was necessary, given the obstruction by 285 of the Receiver's efforts to exercise its powers under the Appointment Order, but I am not sure that I would have agreed to the extension. In my view, the extension only rewarded 285 for its bad behavior. In respect of the bit map image, the parties agreed to what became paragraph 8 of the order of Spence J.:

8. THIS COURT ORDERS that 285, and its principals (Amir Kassam, Gregory Goutis, and Rahim Bhaloo) shall by no later than September 10, 2011, cause a bit map image of the computer server and computers located at the Premises and any computers owned or controlled by the principals of 285 (the "Computers") to be created and delivered to the offices of Cassels Brock & Blackwell LLP, 2100 Scotia Plaza, 40 King Street

West, Toronto, Ontario, where such bit map image shall be held pending further Order of this Court.

(xvi) On September 12, two days after the deadline set by Spence J., 285's counsel wrote the Receiver to advise:

I can also confirm that a forensic computer company has been retained to image the requisite computers, and except to receive confirmation that has been completed, and the actual disc, today or tomorrow.

(xvii) Today and tomorrow came and went - no disc was delivered by 285 to the Receiver;

(xviii) On September 16 Receiver's counsel wrote to 285's counsel, in part:

We note that the order of the Honourable Mr. Justice Spence required the creation of bit map images of various computers by September 10, 2011. Would you confirm that this has been completed and confirm a list of the drives which have been imaged.

(xix) The Receiver filed a Second Supplementary Report to the Receiver's Second Report dated September 22, 2011, in which it reported that it still had not received confirmation of delivery of a bit map image to 285's counsel.

(xx) At the hearing before me on September 27 counsel advised that the previous day 285 delivered some bit map image to its counsel.

C. Analysis

8 From my review of the Receiver's Reports I have no hesitation in concluding that 285 has failed to comply with the terms of the Appointment Order, including paragraph 9. 285 has obstructed the Receiver's access to its electronic Records and computer server, and it has played a game of cat and mouse, imposing extra time and costs on the Receiver's efforts to perform its powers under the Appointment Order.

9 It is crystal clear from the face of my order that in the case of Records "stored or otherwise contained on a computer or other electronic system of information storage", the Receiver was to have "unfettered access" in order to allow it:

to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or a bitmap image or such other manner of retrieving and copying the information as the Receiver in its discretion deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Receiver.

10 To date 285, and its principals, Messrs. Bhaloo, Kassam and Goutis, have denied the Receiver access to computers on which Records are stored. Consequently, 285, Mr. Bhaloo, Mr. Kassam and Mr. Goutis have breached my Appointment Order.

11 To date 285 and its principals, Messrs. Bhaloo, Kassam and Goutis, have not permitted the Receiver to make a bitmap image of "all of the information contained therein". Consequently, they have breached my Appointment Order.

12 They have now been in breach of the Appointment Order for some three months.

13 285 and its principals, Messrs. Bhaloo, Kassam and Goutis, also breached paragraph 8 of the order of Spence J. because they did not deliver a bit map image to their counsel by September 10, 2011, the stipulated deadline. An image was not delivered until September 26.

14 285 and its principals have, in effect, turned paragraph 9 of the Appointment Order on its head by denying the Receiver access to the computers where Records are stored and by assuming control over the process of selecting the electronic Records which it determines should be fed to its counsel or the Receiver. The whole point of my Appointment Order was to enable an independent Receiver to investigate and collect information in respect of the affairs of 285. By its obstruction of the Receiver's efforts to gain access to computers upon which Records are stored, 285 has emasculated the Receiver, and its investigative utility, by turning it into a mere repository of such information as 285 sees fit to release to it.

15 That is unacceptable. Such conduct constitutes a direct breach of the Appointment Order.

16 I recognize that the computer server on which 285 stores its Records is used by other companies in the Liberty Assisted Group. The interconnectedness of the companies in that group was known when the appointment motion was brought and, more importantly, was known when counsel were working out the terms of the Appointment Order. I spent several paragraphs in my June Reasons commenting on the parties' respective positions on the terms of the Appointment Order. Why, in heavens name, did 285 not advert back in June to the issue of how, as a practical matter, access to its Records should occur given its joint use of the server with related companies? Instead, the last three months have been spent by 285 interpreting the Appointment Order in a way which has obstructed and frustrated the Receiver in performing its duties.

17 In its counsel's letter of July 15 the Receiver took the following position:

Again the issue of the scope of the review is an issue, it remains the Receiver's position that all records of other companies and their dealings with [285] should be produced. Our client should not have to guess whether complete disclosure has been made by your client. In the event there is any disagreement on the entitlement to records, a motion for direction may be brought to resolve the same.

18 That was a correct interpretation of paragraphs 8, 9 and 10 of the Appointment Order. Paragraph 8 provided:

THIS COURT ORDERS that all Persons shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of 729285, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "Records") in that Person's possession or control, and shall provide to the Receiver or permit the Receiver to make, retain and take away copies thereof and grant to the Receiver unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph 8 or in paragraph 9 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to the privilege attaching to solicitor-client communications or due to statutory provisions prohibiting such disclosure.

19 As can be seen, the defined term "Records" is not limited to documents owned by 285. Instead, it encompasses documents "related to the business or affairs of 729285". As the Reports of the Receiver disclose, 285 and its principals have stated that some information relating to the business or affairs of 285 will be found on records owned by related companies. That state of affairs has resulted from a decision of the Liberty Group of companies to operate its affairs and maintain its records in an inter-connected and co-mingled fashion. Consequently, for the Receiver to exercise the powers granted to it under the Appointment Order, it is inevitable that the Receiver will have to inspect and consider documents owned by companies related to 285. If the Respondents have intermingled the records of their companies so that documents relating to the business or affairs of 285 are owned by, or are under the control of, other Liberty Group companies, that does not permit the Respondents to deny access to those documents or to a computer server on which they are stored. Paragraphs 8 and 9 of my Appointment Order are not limited to documents *owned* by 285; they encompass documents "*relating to the business or affairs of 729285*". With all due respect, nothing could be clearer.

20 In its counsel's letter of July 15 the Receiver proposed the following solution to 285's expressed concern about the disclosure of certain documents stored on the computer server:

Notwithstanding the issue of a bit map copy, our client requires access to the company's server in order to identify electronic records that are subject to disclosure. My client has recommended that its IT consultant meet with your

client's IT consultant or Mr. Goutis in order to understand the file structure and systems of the server. They can then jointly recommend an appropriate method to identify, copy and/or print those electronic records required to be produced. Such records may include, but not necessarily be limited to, accounting system files, correspondence files, electronic memos, email messages and electronic copies of legal documents not otherwise disclosed to date. In the event that Mr. Goutis is unfamiliar with the accounting systems to allow printing, exporting or copying [285] will have to provide a person experienced to assist the Receiver in this regard.

Those were reasonable and practical suggestions by the Receiver which 285 was not justified in rejecting. 285's refusal to adopt and follow those suggestions appears to reflect a corporate decision to obstruct the work of the Receiver and ignore the clear terms of the Appointment Order.

21 Such obstruction must end, otherwise 285 will succeed in undermining the court-sanctioned mandate of the Receiver and, in effect, secure the reversal of the Appointment Order, a reversal which Lederman J. refused to grant.

22 Parties cannot obstruct or interfere with the work of a court-appointed officer, such as the Receiver, yet that is precisely what 285 and its principals have done.

23 I must confess I question why I need to grant further relief with respect to electronically stored Records beyond that which is set forth in paragraph 9 of the Appointment Order. 285 must comply with that order. That means that 285 must grant the Receiver immediate, unfettered access to the computers and servers on which Records are located. 285's failure to do so risks attracting significant judicial sanctions.

24 Nevertheless, I grant, with a few modifications, the additional relief set out in paragraphs 4 and 5 of the Receiver's draft order found at Tab F of the Second Supplementary Report to the Receiver's Second Report to the Court. But, I wish to emphasize that by so doing I am not detracting from, or limiting in any way whatsoever, the breadth of paragraphs 8 and 9 of the Appointment Order.

25 The first modification which I will make to the proposed draft order concerns the deadline for compliance. Although counsel agreed to a deadline of October 12, 2011, I do not accept that as a reasonable deadline. Three months have passed since I made the Appointment Order, and 285 simply has stonewalled. The time for games is over. 285 has until October 4 to comply. Second, I will change the references to "electronic documents" to "electronic Records" so that the language in all orders is consistent.

26 Further, I am not content with the way in which the bit map image has been produced. For three months 285 has denied the Receiver access to the server on which Records are stored and assumed control over the production of a bit map image. I will say candidly that I have little confidence in the reliability of the bit map image so produced. *Consequently, 285 must give the Receiver, or its IT consultant, access to the server no later than 10:00 a.m. on Friday, September 30, 2011, so that it can make a bit map image. The Receiver also is entitled to copy any information stored on the computer server required to investigate, if necessary, whether any information stored on the computer related to the business or affairs of 285 has been altered in any way since the date of the Appointment Order.* Receiver's counsel is to hold the bit map image in escrow pending the agreement of the parties or further order of this Court.

III. Access to hard copy records issue

27 During the course of its dealings with 285 the Receiver learned that the company kept its accounting records at four locations, including its offices at 231 Avenue Road and a storage room, or locker, located at Laird Drive and Eglinton Avenue. To date 285 has refused to permit the Receiver to inspect the documents located at those locations, taking the position that they are co-mingled with the records of related Liberty Group companies which are not subject to the order. Instead, 285 adopted an approach of providing records to the Receiver through its counsel.

28 Again, from my review of the Receiver's Reports I have no hesitation in concluding that 285 has failed to comply with the terms of the Appointment Order, including paragraphs 8 and 10. Paragraph 8 I reproduced above. Paragraph 10 of the Appointment Order specified that the Receiver shall have access "to those premises wherever the books and records of 729285 are kept, retained, stored or used...at any time or times including evenings, weekends and holidays". It went on to

state that:

729285 shall take all reasonable steps to ensure the Receiver will have such access, provided however that the Receiver shall exercise its unfettered access to and control over the books and records of 729285 in such a manner as to minimally interfere with the business of 729285.

29 As in the case of paragraph 9 of the Appointment Order, 285 has turned paragraphs 8 and 10 on their heads by denying the Receiver access to the locations where Records are located and by assuming control over the process of selecting Records which it then feeds to the Receiver.

30 That, too, is unacceptable and a breach of the Appointment Order.

31 As in the case of the electronic Records, I question why I need to grant further relief beyond that which is set forth in paragraphs 8 and 10 of the Appointment Order. I repeat: 285 must comply with that order. That means the Receiver can enter into and have unfettered access to the Records relating to 285. That means the Receiver can inspect the filing cabinets or other Record depositories at those locations.³ If those Record depositories contain documents owned by a non-285 company, then the Receiver cannot exercise its powers under paragraph 8 of the Appointment Order unless (and that is a big unless), the document "relates to the business or affairs of 729285". Again: if the Respondents have intermingled the records of their companies so that documents relating to the business or affairs of 285 are owned by, or are under the control of, other Liberty Group companies, that does not permit the Respondents to deny access to those documents to the Receiver. Paragraph 8 of my Appointment Order is not limited to documents *owned* by 285; it encompasses documents "*relating to the business or affairs of 729285*".

32 I will grant the relief sought in paragraph 3 of the Receiver's draft order, but I wish to emphasize that by so doing I am not detracting from, or limiting in any way whatsoever, the breadth of paragraphs 8 and 10 of the Appointment Order.

IV. Receiver's request to expand its powers to conduct examinations

33 The Receiver also seeks an order permitting it to examine, under oath, (i) all individuals that allegedly advanced monies to 285, (ii) all individuals and corporations which have had loans due to or from 285, and (iii) all individuals and/or corporations that received funds from the sale of the Royalton Residences.

34 Counsel for 285 submitted that it would be premature to make such an order and, instead, argued that the issue should be parked until the completion of the production process and the examination of Mr. Goutis. I disagree. Based on the chronology of events set out in the Receiver's Reports, I conclude that the failure of 285 to comply with the production requirements of the Appointment Order renders it just, reasonable and necessary to grant the Receiver the requested powers of examination. The evidence discloses that 285 is doing its best to stonewall the Receiver and delay the production of relevant documents and information. Under those circumstances, an expansion of the Receiver's powers of examination is necessary in order to enable the Receiver to complete its investigation within the stipulated time. I therefore grant the orders sought in paragraph 2 of the draft order found at Tab F of the most recent Receiver's Report.

V. Costs

35 The Receiver, AGI, may serve and file with my office written cost submissions, together with a Bill of Costs, by October 7, 2011. The Liberty Group Respondents may serve and file with my office responding written cost submissions by October 14, 2011. The costs submissions shall not exceed four pages in length, excluding the Bill of Costs.

Motion granted, with few modifications relating to certain relief sought.

Footnotes

¹ 2011 ONSC 4136 (Ont. S.C.J. [Commercial List])

² [2011 ONSC 4704](#) (Ont. Div. Ct.)

³ In paragraph 45 of its Second Report the Receiver noted that Mr. Bhaloo had indicated that documentation in support of disbursements made by 285 on behalf of related companies were retained in the files of the related companies and not in the files of 285. At the hearing counsel for 285 stated that Mr. Bhaloo disputed the accuracy of the Receiver's statement. Mr. Bhaloo, however, did not file any evidence on the point, so I do not accept his challenge to the accuracy of the Receiver's report.

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